(Conflict) Principles of European (Consumer) Contract Law – an Update

By Gralf-Peter Calliess

A. Introduction

In April 2003 I commented on the European Commission's Action Plan on a More Coherent European Contract Law [COM(2003) 68 final] and the Green Paper on the Modernisation of the 1980 Rome Convention [COM(2002) 654 final].[1] While the main argument of that paper, i.e. the common neglect of the inherent interrelation between both the further harmonisation of substantive contract law by directives or through an optional European Civil Code on the one hand and the modernisation of conflict rules for consumer contracts in Art. 5 Rome Convention on the other hand, remain pressing issues, and as the German Law Journal continues its efforts in offering timely and critical analysis on consumer law issues,[2] there is a variety of recent developments worth noting.

B. European Contract Law

Since the publication of the Action Plan on a more coherent European Contract Law, the Council and the European Parliament have both passed resolutions on it and the Commission has received contributions from 122 stakeholders. All contri-

[1] Gralf-Peter Calliess, Coherence and Consistency in European Consumer Contract Law: a Progress Report, 4 German L. J. No. 4 (1 April 2003), at http://www.germanlawjournal.com/pdf/Vol04No04/PDF_Vol_04_No_04_333-372_Private_Calliess.pdf

[2] See Hans-W. Micklitz, The Necessity of a New Concept for the Further Development of the Consumer Law in the EU, 4 German L. J. No. 10 (1 October 2003), at http://www.germanlawjournal.com/pdf/Vol04No10/PDF_Vol_04_No_10_1043-1064_European_Micklitz.pdf; and Stefan Haupt, An Economic Analysis of Consumer Protection Law, 4 German L. J. No. 11 (1 November 2003), at http://www.germanlawjournal.com/pdf/Vol04No11/PDF_Vol_04_No_11_1137-1164_Private_Haupt.pdf; Kristin Nemeth & Helmut Ortner, The Proposal for a new Directive concerning Credit for Consumers, 4 German L. J. No. 8 (1 August 2003), at http://www.germanlawjournal.com/pdf/Vol04No08/PDF_Vol_04_No_08_801-813_european_Nemeth_Ortner.pdf

butions as well as a Summary of Responses prepared by the Commission are available through the Commission's European Contract Law Homepage.[3] The two most striking results of the consultation process are the following: On the one hand the so-called sector-specific approach of community harmonisation measures was criticized by a variety of responses, especially from academia.[4] While the Action Plan promoted the initiation of further sector-specific harmonisation measures and of the preparatory work to an optional European Contract Code as two complementary measures to be taken simultaneously, the Commission now seems to have become aware of the fact, that the sector-specific minimum harmonisation measures are less a solution then themselves part of the problem. In other words, the fragmentation of Member States' mandatory contract law rules is increasingly seen as a barrier to the completion of the internal market. Thus, on the very entry-page of the Commission's European Contact Law Homepage today we can read: "To date the EC legislator has aimed to address problems in contracting in the Internal market by adopting measures relating to specific contracts or sectors. This sector-specific approach has, however, not been able to solve a number of problems."[5] On the other hand, while the interrelation with the Green Paper has so far been neglected by the Action Plan, both the Council and the academic contributions stress the need for coherence and coordination between the follow-up to the Action Plan and the Green Paper on the conversion of the Rome Convention of 1980.[6]

The Commission received broad support for its idea of the production of a Common Frame of Reference (the "CFR"), i.e. a set of common definitions and principles compiled in a legally non-binding text based on research projects like the Lando-Principles[7] and designed to guide future legislation. Almost all responses to the Action Plan as well as the contributions to a conference involving Member States and stakeholders from business, legal practice and consumer associations to assess the development of the CFR, which was jointly organised by the European

[3] http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/ action-plan_en.htm

[4] See Summary of Responses, at 3.1.5, p. 8, at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/analyticaldoc_en.pdf

[5] http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm, visited on 16 July 2004.

[6] Summary of Responses, p. 2 and 8

[7] The Lando Principles of European Contract Law have been compiled by an Expert Commission under the chairmanship of Professor Ole Lando, available at http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/

Parliament and the Commission on 28 April 2004,[8] voted in favour of such endeavor. There was a broad consensus that not only academic research projects under the Sixth Framework programme, but as well the Member States and other stakeholders should be involved in this process. Generally welcomed was the proposal of Gerrit Stein of the German Ministry of Justice to create a European discussion forum in which high level lawyers, such as legal practitioners or representatives of the business sector, could monitor, discuss and examine the work on the preparation of the CFR. Dirk Staudenmayer of DG Sanco presented the initial thinking of the Commission's services with regard to the necessary procedure for the elaboration of the CFR, especially to the question of how to best organize effective stakeholder involvement. He noted that a Follow-up Communication on both the form and content of the CFR and the procedures for ensuring stakeholder participation would be presented by the Commission later this year. The contracts for researchers would further be awarded under the Sixth Framework programme most probably in July and would commence before the end of 2004.[9] However, with regard to the intention to coordinate this research as indicated in the Action Plan, the Commission experienced a serious backlash. As rumours circling at the 2004 Vienna Conference of the Society of European Contract Law[10] have it, the successor of the Lando Commission, i.e. the Study Group on a European Civil Code lead by Christian von Bar,[11] for reasons of methodological purity (i.e. the adopted so-called "common core"-approach based on comparative legal analysis[12] as opposed to the political interventionist approach of consumer law) was not willing to integrate the mandatory European consumer law acquis into its research project, and thus rejected to collaborate with the Acquis-Group[13] with regard to the development of the CFR.

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[8] See http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/ commonframe_en.htm

[9] See Conference Summary at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/conference_summary_en.pdf

[10] The Architecture of European Codes & Contract Law, Conference in Vienna, 18 and 19 June 2004, programme and presentations, available at www.secola.org

[11] http://www.sgecc.net/

[12] See Lorenz, Rechtsvergleichung als Methode zur Konkretisierung der allgemeinen Grundsätze des Rechts, JZ 1962, 269; Schlesinger, Introduction to, Formation of Contracts – A Study of the Common Core of Legal Systems 1 (Vol. I, 1968); Bussani & Mattei, The Common Core Approach to European Private Law, 3 Colum. J. of Eur. L. 339 (1997).

[13] http://www.acquis-group.org/

C. European Conflict of Laws

The Commission received over seventy replies to its Green Paper on the Rome Convention, which have been published on the Homepage of DG Justice and Home Affairs.[14] A Summary of Responses by the Commission is not yet available. However, a summary view of the replies reveils the following tendencies. While the inherent interrelation of the European contract law project with the conversion of the Rome Convention was an issue in the replies to the Action Plan (see above at para. 2), the same does not hold true for the contributions in response to the Green Paper. As the main contact point of both projects is related to the consumer state principle or country of destination approach embodied in Art. 5 of the Rome Convention and its interrelation with the harmonisation of the mandatory consumer protection laws through European directives, the following remarks are focused on the responses to the reform of Art. 5 Rome Convention. With regard to the preconditions of consumer protection set out in Art. 5 Rome Convention, i.e. the definition of the situative (passive consumer) and substantive (supply of goods and services) criteria of application, there seems to be a broad consensus that the scope of the current Art. 5 is too narrow and that it should be amended in accordance with Art. 15 para. 1 c) of the Brussels I Regulation.[15] That is to say that Art. 5 of a future Rome I Regulation is likely to cover all kinds of contracts, including leases, licensing, transfer of shares etc. on the one hand, and to be applicable to all cross-border contracts resulting from business activities (including e-shops), which were directed (among others) to the consumer's state of habitual residence on the other hand.

With regard to the legal result following from the applicability of Art. 5 there seems to be a general trend in the replies to stick to the 'country of destination'-approach even in pure internal market cases, i.e. where the home state principle of Art. 4 (2) or a choice of law under Art. 3 Rome Convention would lead to the application of another EU Member State. For a business distributing throughout Europe this would imply that it may - by choice of law - try to contract under the law of its home Member State. But although this state had implemented the European consumer directives at issue (e.g. the distance sales directive[16]), the laws of the 24 other Member States might still be applicable because the consumer's home Member State might have transposed the Directive in a slightly different manner, here and

[14] http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm

[15] The Brussels I Regulation and the Council and the Commission declaration on its Articles 15 and 73 are available at http://europa.eu.int/comm/justice_home/fsj/civil/recognition/fsj_civil_recognition_general_en.htm

[16] Directive 97/7/EC, 1997O.J. (L 144) 19.

there providing for a so-called higher level of protection in accordance with the minimum harmonisation approach. The worst result of such conflict rule would be, that according to the relevant text books the question which law applies – i.e. the consumer state's law or the law chosen by the business – is to be decided after a conflict has arisen and in accordance with a so-called "principle of favourability", i.e. the law most detrimental to the business from an ex post perspective applies. Besides the question whether or not such doctrine did in fact embrace more a Robin Hood-like principle of justice than a rule of law, the business not knowing which Member States law will apply in advance is unable to comply with the excessive information obligations inherent to European consumer contract directives at the present state of minimum harmonization.[17]

Strikingly, almost none of the Green Paper-contributions of learned Private International Lawyers are even addressing this issue.[18] The German "Centre of Excellence", the Max Planck Institute for Foreign Private and Private International Law in Hamburg, in its 121 pages contribution,[19] for example, states that the very basic idea of Private International Law, the application of foreign law by domestic judges (comitas), is inappropriate in consumer contract law (i.e. for approximately 90 per cent of all contracts concluded!), because the consumer bringing an action under Art. 15 ff. Brussels I Regulation at the court of her domicile would have to assert her rights under foreign law otherwise.[20] Left unaddressed is the obvious question, whether or not European conflict rules – after some twenty years of intensified harmonisation of mandatory substantive consumer contract rules in Europe – must somehow discriminate between the application of the – with regard to consumer protection functionally equivalent – law of another EU Member State, and the law of a third State.

In order to reduce the legal uncertainty inherent to the current Art. 5 (2) Rome Convention approach of the application of the law which is most favourable to the consumer (dépeçage), some propose to abolish choice of law in consumer contracts

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[17] The problems arising are described in the contribution of Amazon Europe, at http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/amazon_europe_en.pdf

[18] The German Council for PIL (Deutscher Rat für Internationales Privatrecht) e.g., simply states in a single apodictic sentence: "Art. 5 should stick to the principle of favourability." Thanks to the fact that such contribution is available in German only, it will not influence the European discussion anyways.

[19] MPI for Private Law Hamburg, Comment on the Green Paper, available at http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/max_planck_institute_foreign_private_international_law_en.pdf

[20] MPI for Private Law Hamburg, Comment on the Green Paper, 55

completely: this in fact would resemble the approach taken in Art. 120 of the Swiss Act on conflict of laws.[21] While contributing to legal certainty this would, however, in combination with the extended criteria of application of Art. 5 (see above para. 4) render the harmonisation directives not only useless but, in addition, ultra vires with respect to the competency under Art. 95 EC-Treaty.[22] The question, how to integrate the Internal market Home State principle, i.e. mutual recognition on the basis of minimum or full harmonisation, into the Rome Convention thus remains open.

D. From Minimum towards Full Harmonisation of Consumer Law?

In its Consumer Policy Strategy 2002-2006,[23] the Commission indicated that the simple application of mutual recognition, without harmonisation, is not likely to be appropriate for consumer protection issues, but provided a sufficient degree of harmonisation is achieved, the country of origin approach could be applied to remaining questions.[24] In order to establish the Home State principle as well for cross-border consumer contracts, the Commission in two recent proposals for consumer directives followed a so-called "full harmonisation"-approach, indicating that the Member States shall not be allowed to provide for a higher level of protection, at least not in the core areas of harmonisation.

I. Unfair Commercial Practices Directive

As a result of the Commission's 2001 Green Paper on EU Consumer Protection and the Follow-up to the Green Paper that took place in 2002,[25] the Commission on 18

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[21] See Nordic Group for Private International Law, 36, available at http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/nordic_group_private_international_law_en.pdf; see as well Stefan Leible, in: Jenaer Expertentagung, available at http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/jenaer_expertentagung_27_28_06_2003_de.pdf

[22] See Calliess, supra note 1, at para. 45, 46.

[23] COM(2002) 208 final, available with follow-ups at http://europa.eu.int/comm/consumers/overview/cons_policy/index_en.htm

[24] See Calliess, The Limits of Eclecticism in Consumer Law, 3 German L. J. No. 8 (01 August 2002), at http://www.germanlawjournal.com/article.php?id=175

[25] All documents available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm; see as well Hugh Collins (ed.), The Forthcoming EC Directive on Unfair Commercial Practices: Contract, Consumer & Competition Law Implications, den Haag (Kluwer) 2004, comprising the proceedings of the May 2002 London Conference of SECOLA.

June 2003 adopted a proposal for a Directive on Unfair Commercial Practices,[26] which aims at making business-to-consumer cross-border trade simpler by replacing the existing multiple volumes of national rules and court rulings on commercial practices with a single set of common rules. While the Directive contains no minimum harmonisation clause, which would allow Member States to provide for a higher level of protection in the harmonised fields, proposed Art. 4 of the Directive provides that the Home State principle applies, so that businesses are able to set up marketing strategies throughout the Internal market under a single regulatory regime. However, the explanatory memorandum proposes that such mutual recognition was possible only on the basis of uniform rules on a high level of consumer protection:

The Directive "fully harmonises EU requirements relating to unfair business-to-consumer commercial practices and provides an appropriately high level of consumer protection. This is needed to address the internal market barriers caused by divergent national provisions and to provide the necessary support to consumer confidence to make a mutual recognition approach workable. Member States will not be able to use the minimum clauses in other directives to impose additional requirements in the field co-ordinated by this Directive."[27]

While contract law is outside the scope of the Directive (Art. 3 No. 2), the Directive deals as much as the consumer contract directives with a core issue of consumer protection. Whereas the E-Commerce Directive (2000/31/EC) already provided for the Home State principle to be applied to E-Commerce commercial activities, in the off-line world the conflict rule for the laws of unfair commercial practices is the effects doctrine (Auswirkungsprinzip), which is comparable to the Consumer State principle of Art. 5 Rome Convention, since both conflict rules provide for the applicability of the law of the relevant market (Marktortprinzip), i.e. where commercial activities take place and/or a transaction is entered into.[28] For this reason, the combined full harmonisation and mutual recognition approach could be seen as a blue print as well for a conflict rule for cross-border consumer contracts.

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[26] COM (2003) 356 final: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/directive_prop_en.pdf

[27] Explanatory Memorandum No. 30 indent 3, COM (2003) 356 final at p.8.

[28] See Gerald Spindler, Herkunftslandprinzip und Kollisionsrecht - Binnenmarktintegration ohne Harmonisierung? Die Folgen der Richtlinie im elektronischen Geschäftsverkehr für das Kollisionsrecht, RabelsZ 2002, 633-709; and Peter Mankowski, Das Herkunftslandprinzip des E-Commerce-Rechts als Internationales Privatrecht, EWS 2002, 401-410

However, on 20 April 2004 the European Parliament adopted a legislative resolution on the Unfair Commercial Practices Directive, which promotes the proposal in general, but suggests among others an amendment to Art. 4 of the Directive, according to which by way of derogation from the Home State principle, for a period of five years from the transposition of the directive, Member States shall be able to take national measures which are more rigorous or restrictive.[29] This was followed by a political agreement reached by the Competitiveness Council on 18 May 2004, in which the Home State principle provided for in Art. 4 No. 1 of the Commission's proposal was abandoned. In its place, a new Art. 3 No. 5 a reads as follows: "For a period of six years from the date referred to in Article 18, first subparagraph, Member States shall be able to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 17a may, if considered appropriate, include a proposal to prolong this derogation for a further limited period."[30]

While the EP proposal would only postpone the effects of full harmonisation for a time period of 5 years, the Council made it a six years postponement with an option for infinite prolongation of such period. These amendments may be taken as a symbol for the deep disregard with a "full harmonisation"-approach in consumer issues, not only within the Member States represented by the Council, but even in the usually more integration friendly European Parliament. The Directive will undergo a second reading in the European Parliament this autumn.

II. Consumer Credit Directive

On 11 September 2002 the Commission presented a proposal for a revision of the consumer credit directive (87/102/EEC) of 1986.[31] While the latter as amended by Directives (90/88/EEC) and (98/7/EC) is comprised out of 19 brief articles, the former proposal for its revision amounts to 89 pages with 38 Articles and three Annexes containing a vast amount of mathematical formulas with examples for calculation (for: iudex non calculat). The substance of such proposal has already

[29] Doc. A5-0188/2004: http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+TA+P5-TA-2004-0298+0+DOC+XML+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y

[30] http://register.consilium.eu.int/pdf/en/04/st09/st09667.en04.pdf

[31] COM(2002) 443 final: http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0443en01.pdf

been discussed in this Journal.[32] With regard to the extent to which this proposal aims at further harmonisation, it contains a great innovation, i.e. an explicit harmonisation clause which reads as follows:

"Article 30 Total harmonisation and imperative nature of the directive's provisions. 1. Member States may not introduce provisions other than those laid down in this directive, except with regard to: a) registration of credit agreements and surety agreements in accordance with Article 8 (4); b) the provisions concerning the burden of proof referred to in Article 33."[33]

While the Unfair Commercial Practices Directive contains explicit language on the introduction of the Home State principle in Art. 4 (see supra 1.), but in its legally binding part no full harmonisation clause, the Consumer Credit Directive to the opposite contains a "total harmonisation"-clause, but no conflict rule for purely internal market cases, except for the usual exclusion of the choice of law of a third State. Under the regime of the Rome Convention, some argue that so-called "pure" credit agreements which are not linked to the supply of another good or service do not constitute a (financial) service under current Art. 5 (1) of the Rome Convention, so that under Art. 4 (2) Rome Convention the law of the home state of the creditor will govern cross-border contracts. However, this will change once Art. 5 (1) Rome Convention is amended in accordance with Art. 15 No. 1 c) of the Brussels I Regulation in order to cover all kinds of business-to-consumer contracts (see supra C). In this context the absolute silence of the Commission's proposal with regard to the conflict of laws effects of the "total harmonisation"-approach seems to be somewhat surprising. In fact, either the Home State principle will apply under the Cassis philosophy of the ECJ, or Art. 5 of a future Rome Regulation will lead to the applicability of the consumer state's law. However, the choice of the law of any Member State of the EU cannot deprive the consumer of the protection of the law of its state of habitual residence, once Member States' laws are fully harmonised. Thus, a contractual choice of the law of another Member State will remain effective under current Art. 5 (2) Rome Convention. In any case, the effect of the proposed total harmonisation is that creditors are able to distribute throughout the Internal market under a single legal regime (European passport principle).

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[32] See Kristin Nemeth & Helmut Ortner, The Proposal for a new Directive concerning Credit for Consumers, 4 German L. J. No. 8 (1 August 2003):
http://www.germanlawjournal.com/pdf/Vol04No08/PDF_Vol_04_No_08_801-813_european_Nemeth_Ortner.pdf

[33] COM(2002) 443 final: http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0443en01.pdf

The question remains, why the Commission is not explicitly naming the country of origin approach as inherent in its proposal. An explanation might be the above (para 1) noted common disregard of full harmonisation and the Home State principle in the area of consumer protection law. And in fact, on 20 April 2004 the European Parliament (the "EP") endorsed the proposal in its first reading subject to amendments, amongst which the almost complete abandonment of the "total harmonisation"-clause is the most interesting. In a report to the EP's Committee on Legal Affairs and the Internal Market dated 2 April 2004 and prepared by the German Member of EP, Joachim Wuermeling, the above quoted Art. 30 No. 1 of the proposal was deleted and a new No. 6 added as follows: "This Directive shall not prevent Member States from maintaining or adopting more far-reaching provisions for the best possible consumer protection in accordance with their Treaty obligations."[34] Members of the EP argued that the major aim of the directive should be to establish minimum EU-wide standards for consumer credit agreements and not full harmonisation, since the latter would lower the standard of consumer protection in many EU countries. They therefore said Member States should retain the right to grant their consumers even higher standards of protection. However, it was acknowledged that in some areas full harmonisation may be needed to ensure that consumers can compare offers in order to boost an internal market in consumer credit. An example would be the rules on the annual percentage rate of charge laid down in the directive.

E. Conclusion: An emerging System of European Contract Law(s)?

The awareness of the necessity of a systematic approach to all aspects of European contract law, i.e. substantive general, business, and consumer contract law as well as corresponding rules for conflict of laws, based on overarching principles, seems to spread especially within the Commission services and more generally in the context of the Action Plan. However, since consumer law for many remains to be a kind of "holy cow" of the 20th century national welfare-state in relation to its citizens ("German law for German consumers"), in the praxis of European legislation under Art. 95 EC-Treaty it remains difficult for the concept of the "Citizen of Europe" as entrenched in the philosophy of the Internal market to prevail.

Although it always seems to be somewhat foolish to embark on "Commission bashing" from the ivory tower of academia, a lot of the problems involved in the above described projects of the Commission are caused by a lack of a systematic

[34] PE 338.483 Doc. A5-0224/2004, available through the European Commission's Prelex and the EP OEIL systems.

approach in its acitivities (i.e. multiple directive and green paper launching) and – in addition – a lack of clear cut communication of the underlying principles of its initiatives. Why, for example, is the Commission promoting two directives at the same time, where one (Consumer Credit) entails an explicit full harmonisation clause without the corresponding conflict rule (Home State principle), while the other (Unfair Commercial Practices) contains an Internal market conflict rule (Home State principle) but no explicit full harmonisation clause? And why do both proposals fail to explain the inherent concept behind the combination of full harmonisation and mutual recognition? Moreover, while the Commission in both projects is very carefully and empirically well informed describing the relevant barriers to the Internal market, which shall be tackled by the harmonisation measures, and which barriers are a necessary precondition in order to construct a Community competency under Art. 95 EC-Treaty, why is the Commission not expressly stating that all the proposed harmonisation measures are suited to overcome the described barriers to the Internal market only, if they are combined with mutual recognition based on either full harmonisation or the presumption of equivalence following from minimum harmonisation?

Taking the proposed Consumer Credit Directive as an example, the Commission should inform the Council and the European Parliament in a straight forward manner that under the ratio of Art. 95 EC-Treaty there is absolutely no use to proceed on a further and even more excessive harmonisation of Member State's laws without at the same time fully harmonizing the mandatory information obligations as well as the calculation of the cooling-off period, and not only "the rules on the annual percentage rate" as suggested by the EP. As to the question, which specific rules call for mutual recognition and thus for full harmonisation, the Commission could take the work of Stefan Grundmann and Wolfgang Kerber on a European System of Contract Laws[35] as a guideline, where both authors explain in detail, why from the standpoint of a supplier with a Europe-wide distribution strategy it is essential that all obligations which have to be fulfilled before or while a contract is concluded (i.e. information obligations) have to be uniform or subject to the Home State principle, while substantive mandatory protection rules which only alter the outcome of a potential trial without generating pre-dispute obligations to provide information may remain subject to decentralised legislation by the Member States.

[35] Stefan Grundmann and Wolfgang Kerber, European System of Contract Laws – a Map for Combining the Advantages of Centralised and Decentralised Rule-making, in: Stefan Grundmann and Jules Stuyck (eds.), An Academic Green Paper on European Contract Law, Kluwer 2002, p. 295 ff.